SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 233

JAMES J. WALDRON, PETITIONER,

vs.

MOORE-McCORMACK LINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 24, 1966

[fol. A]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29504

JAMES J. WALDRON, Plaintiff-Appellant,

against

MOORE-McCORMACK LINES, INC., Defendant-Appellee.

Appellant's Appendix

[fol. 1]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES J. WALDRON, Plaintiff-Appellant,

against

MOORE-McCORMACK LINES, INC., Defendant-Appellee.

STATEMENT UNDER RULE 15(b)

Suit was commenced by filing of Summons and Complaint on May 13, 1960. Issue was joined by service of Answer on December 27, 1960.

Trial with a jury, before Hon. Charles H. Tenney, U.S.D.J., was held on March 30, 31, April 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15 and 16, 1964.

Plaintiff's claim for unseaworthiness based on the alleged failure to provide sufficient manpower was dismissed by the Court on April 16, 1964.

Verdict on the jury issues was rendered for the defendant on April 16, 1964.

Final judgment for the defendant was filed on April 17, 1964.

Plaintiff's motion for a new trial was served on April 27, 1960, returnable May 15, 1964.

Plaintiff's motion for a new trial was denied, pursuant to Opinion No. 30561 and Order of Tenney, J. filed on November 10, 1964.

Plaintiff's notice of appeal from the judgment and denial of plaintiff's motion for a new trial was filed on November 20, 1964.

[fol. 2]

Excerpts From Testimony

JAMES J. WALDRON, the plaintiff, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Friedman:

* * * * * * *

Q. When the vessel arrived in New York did you participate in any way in the docking operation?

A. I participated in my usual docking assignment.

Q. Do you recall which pier was employed on May 8, 1960?

A. I don't know the exact name but it was a new pier that Moore-McCormack Lines had just constructed.

Q. And where was this? Was this in the North River, the East River, or Brooklyn?

A. In Brooklyn.

* * * * * * *

Mr. Kimball: I read from the deck log book, May 8, 1960. I am just reading one line at this moment.

(Reading) At 12:40, that being the hour, 12:40, called deck crew for docking.

By Mr. Friedman:

Q. Now, Mr. Waldron, can you explain to me just what calling the deck crew for docking involves?

A. They call approximately fifteen minutes before they actually intend us to report to our job.

Q. And after getting the call did you report to your job station?

A. I got ready to go to work and went to my docking station.

Q. Now when you got to your docking station, who was in charge, if anybody, of the work that you were to do at that time and place?

A. The man in charge is the mate that is in charge of the after section of the ship.

[fol. 3] Q. Is that the third mate?

A. That is the third mate, Mr. Tarantino.

Q. Now with regard to what occurred on May 8, 1960, do you recall what was the first thing that you did with regard to the docking operation?

A. The first thing I did: I went out of the house section and stepped on to the deck. It appeared to be very slippery.

I continued back aft on the stern of the ship where the lines are stored and I was standing on gratings there so it wasn't too bad.

* * * * * * *

Q. Now, Mr. Waldron, you told us that the first thing you did with regard to the docking operation in the early afternoon of May 8, 1960, at Brooklyn, was that you went to the stern of the vessel, the very end, the rear, is that correct?

A. That's correct.

Q. Now, I think you told us that there was grating there.

A. There were gratings.

Q. Would you tell us what you did first? I want to go quite slowly now, if you please.

What was the first thing that you did with regard to this docking operation?

A. This was Sunday, going into New York?

Q. That's right, the afternoon of May 8, 1960, sometime shortly after 12:40, when you got to the docking spot.

A. I reported back there and there wasn't the usual number that is generally there. I noticed that. There was only a few of us. The mate came there and he told us to start passing out the lines.

I assisted in a couple of lines going through the aft chock, another one, and the third line was worked on. I say "worked on," but he indicated to put out—he indicated a forward chock—

Q. First, before we come to that, Mr. Waldron, did you pass out some lines through some chock or more than one chock at the aft end of the vessel?

A. I did.

[fol. 4] Q. And did anything unusual occur at that time?

A. Nothing unusual.

* * * * * * *

Q. By the way, do you recall which side of the vessel you were working on at this time in terms of the pier? Were you inboard, closer to the pier, or outboard, or what?

A. I was inboard.

Q. And do you recall whether that was the starboard side or the port side?

A. Starboard, which is the right.

Q. The right, facing to the front of the vessel?

A. Yes.

Mr. Friedman: May we have the grease pencil to mark 2-A?

Q. Would you be so kind as to mark, with just a small No. 1, the chock that you were using first.

A. I couldn't say which one I used first. I put out two lines but their order I don't know.

Q. While you were working on those two lines, what were you standing on?

A. On the wooden grating.

Q. And then would you just mark both with a No. 1?

A. Two 1's, if you would be so kind.

Q. Did you have any assistance? Was anybody working with you when you put the lines out from these chocks that were farthest to the stern, to the end of the vessel?

Mr. Kimball: Objection, if your Honor please.

The Court: Overruled.

A. Yes. I had one man assisting me.

Q. Where was the rope that you were using? Where was it placed before, immediately before you started to use it in terms of these aft chocks?

A. It was flaked on top of the grating.

Q. How far from these two chocks that you have marked with an orange No. 1, how far was the rope that you used [fol. 5] for those particular chocks?

A. It's not very far. I can't say exactly. I can estimate.

Q. Just approximately.

A. Ten feet.

Q. Was the rope on the gratings or not?

A. The rope was on the gratings.

Q. Now, after you completed the putting out of the line through those two chocks, did you receive any instruction to do any further work?

A. I was told to take another line forward.

Q. For what purpose?

A. To pass it out through a forward chock.

Q. And were you advised as to which chock to use for that purpose?

A. A chock located—

Q. Were you told?

A. I was told which chock, yes.

Q. Who was it that instructed you to use that particular chock?

A. The mate that was back there.

Q. That is the third mate?

A. Mr. Tarantino.

Q. The third mate?

A. That's right.

Q. Could you mark that with a No. 2, the chock that you were instructed to use at that time?

A. (Witness marks.)

Q. You have marked—

A. I made an X on it.

Q. Put a No. 2 there, if you would be so kind, above it.

A. (Witness marks.)

Mr. Friedman: Suppose I at this time hold that up for the jury to see.

I assume that it is here that this substituted exhibit is obviously only the rear half of the vessel.

Q. Will you tell us now, Mr. Waldron, where was the rope that you were to use for the purpose of putting it out through this chock that you have indicated with the No. 2? Where was that located?

A. It was coiled on the grating.

Q. I will tell you what: Would you just indicate, if you can, very approximately, with an R, where approximately [fol. 6] this rope was that you were to use for that chock No. 2? Just give an approximation with the letter R, if you would please be so kind?

A. The letter R?

Q. Yes, just write the letter R in and the approximate area where the rope was coiled.

A. (Witness marks.) No, I am mistaken there.

(Witness marks.)

* * * * * * *

Mr. Kimball: No, your Honor, I don't know whether it was or was not recorded but, as your Honor may see from the exhibit, Mr. Waldron crossed out the first R and put a second R. I just wanted the record to indicate that. Otherwise there is a totally unexplained marking of the exhibit.

The Court: All right, let's put a circle around the correct R.

Mr. Friedman: Okay.

(Witness marks.)

A. If I had the ship here I could do it easily.

(Mr. Friedman shows exhibit to jury.)

Q. Now, Mr. Waldron, will you tell us just what you did after you received this instruction from the third mate to put the rope out through this forward chock?

By "forward" I mean forward of the others, still an aft chock, actually.

A. The man that was assisting me picked up the eye of the line and I followed behind him perhaps—I don't know, ten, fifteen feet, with a portion of the line in my hand, and we started tugging this line.

Q. Can you tell me what kind of line this was?

A. It's eight inches in circumference.

Q. Can you hold up your fingers, please, so that the jury can see you indicating?

A. No, I couldn't—

Q. The circumference is eight inches?

A. The circumference is approximately eight inches. It's very big, heavy.

[fol. 7] Q. Would you go ahead? Just what happened?

A. We had to drag this line, haul it to the chock.

Q. Now the area from where the rope was located to where the chock was, can you tell me what that area consisted of—this chock No. 2?

A. A slippery deck.

Q. Well, was that area covered with gratings?

A. No, that area was not covered with gratings.

Q. Was this chock—No. 2—was that one that you had used previously on previous docking operations?

Mr. Kimball: Objection, if your Honor pleases.

The Court: No, I will permit it.

A. I had never used that chock before.

Q. Now will you go ahead and tell me—you told me that the other man picked up the eye of the rope. Is that what you said?

A. Yes.

Q. That was the very front portion of it?

A. That is the part that is—it's a circle and it's put on a bitt on the dock.

Q. And he grabbed a-hold of that?

A. He had the eye.

Q. And he—

A. Started forward.

Q. Towards the chock?

A. Towards the chock.

Q. And after he went a certain distance, what did you do?

A. After he went a certain distance I followed behind him so as to help him pull this line so he wouldn't be pulling the whole thing.

Q. Go ahead.

A. Well, in pulling the line I got the eye as far as the bitt, I returned to the pile of line, grabbed another piece of it, and started dragging it so he would have sufficient line to pass out the chock to reach the dock.

During this docking one man has to pass the line out and hold it. I mean, he generally holds it with his foot. The line is going out through a chock and he will put a bend in it, by holding it down, applying weight, it is flexible [fol. 8] and it bends easy, and he lets up a little bit and it will run out.

He was holding that line and I was carrying in more line. I had enough there.

Q. And what was the purpose of your carrying more line towards him? Was that a regular procedure or was it not a regular procedure?

A. Well, generally a couple of us would do that but we were shorthanded. I had to bring the slack to him.

Mr. Kimball: I object.

The Court: Strike that answer as not responsive.
Could you repeat the question?

Q. Mr. Waldron, would you listen to the question, please? What was the purpose of your carrying more line towards the man that was up front?

A. Well, if he started letting it out and it ran out, it would jerk everything: it wouldn't go down. It would be stuck. You would have to let it out just so far.

Q. Is it part of the regular procedure of this operation you were performing for you or for someone to provide more line and carry additional line towards the man who was up front of the chock?

A. Yes.

• • • • • • •

Q. When you speak of the procedure of providing additional line for the man at the chock, is this standard procedure for all chocks or is this just with regard to this particular chock, or what?

A. The other chocks—we do the same thing. We don't have as far a distance.

Q. I am not talking about the distance. All I want to know is this: The man who is at the chock and controlling the handing out of the line—

A. Oh, yes, there is always somebody there.

[fol. 9] Q. Whichever chock is in use?

A. Yes.

Q. Do the other men provide him with additional lines?

A. Yes.

• • • • • • •

Q. Mr. Waldron, on May 8, 1960, as you were dealing with chock No. 2, would you go ahead and tell us exactly what you did, carrying on from what you have already told us? What is the next thing you actually did?

A. Chock No. 2—

Q. What we call here chock No. 2 on this exhibit. Now go on.

A. The last chock I worked on?

Q. Yes. What was the next thing that you did? Would you please go ahead and tell the jury what happened?

A. I returned to this pile of rope and I started tugging on it, pulling. It was heavy, like I said. I was pulling as hard as I could.

Q. And did you make any movement?

A. Make any movement in what way?

Q. Did you just stand at the place where the rope was or did you start to move in any direction, or what?

A. I was moving backwards from the pile.

Q. And did you move a certain number of feet or yards or inches or what?

A. Yes. I would say perhaps ten feet.

Q. And at this time just what were you doing? Did you have your hands on anything?

A. I had my arm around one, this one (indicating).

Q. Around the rope?

A. Yes.

Q. And what were you doing with regard to the rope?

A. I was jerking on it, pulling on it.

Q. Were you leaning in any direction or just standing upright or what?

A. Just trying to pull it backwards.

Q. And at that time what were your feet on? Were they on the grating or on the knot, or what?

A. They were on the deck.

[fol. 10] Q. And what if anything happened?

A. My feet went out from under me.

Q. And what happened to you?

A. I struck the deck.

Q. With what part of your body?

A. The back part of my body. I hit it very hard.

Q. What was this deck made of?

A. Steel.

Q. And can you describe to me your fall? Did you just sort of crumple a little or what? Just what happened?

A. I was pulling, like I said, on an angle like that—you know, trying to walk with the line and pull it at the same time, and my feet went out and I went down.

Q. And what was the first part of your body that struck the deck?

A. Well, I couldn't say the first part. I hit the deck with my back, and hit hard. That's all I know.

Q. What did you feel at that time, if anything?

A. Just a little sore, maybe.

Q. And where was this soreness?

A. On my back, around my beltline.

Q. Did you remain on the deck or what did you do next?

A. The person I was working with—I don't know what he said; he said something. I don't know. I got up and continued with the line for a few more minutes.

• • • • • • •

Q. Mr. Waldron, do you recall or do you have any idea as to how long you remained on your back on the deck after your fall?

A. I couldn't say exactly.

• • • • • • •

Cross examination.

By Mr. Kimball (continued):

Q. Now, Mr. Waldron, I think the substance of your testimony, as I understood it, was that you were injured on May 8, 1960, while docking or assisting in the docking of the vessel at the 23rd Street pier, Brooklyn, is that correct?

A. Yes, sir.

[fol. 11] Q. And you say that you had already assisted in passing out two lines and you were helping to pass out a third line when the accident occurred, is that correct?

A. Yes, sir.

Q. Now this third line was the last line which you assisted in passing out to the dock and the vessel was com-

pletely secured within approximately five minutes after the occurrence of your accident, is that correct?

A. Yes, sir.

Q. Now since the log book shows that on May 8, 1960, the vessel was finished with engines, vessel fast and starboard side to east side outer berth at 23rd Street Terminal at 1331, if your estimate is correct, that would indicate that your accident occurred approximately five minutes before 1331, is that so?

A. Around that time, yes, sir.

Q. Now 1331 is another way of saying 1.31 p. m., is it not?

A. Yes, sir.

Q. So your accident occurred approximately 1.25 p. m. on May 8, 1960, is that correct?

A. The best I can remember.

Q. Now there were other men on the stern of the vessel who were working with lines on the offshore side at the time the accident occurred, is that correct?

A. Yes, sir.

Q. The log says here, under the same date, May 8, 1960, 1320—that would be 1.20 p. m.?

A. (No response.)

Q. Is that right?

A. Yes, sir.

Q. It says "1320. First line ashore."

I suppose that that first line was put ashore by some members of the forward docking gang, is that correct?

A. It's possible, sir.

Q. Well, that would be the normal procedure, would it not?

A. Yes, sir.

Q. And if the normal procedure was followed and the first line that went ashore was put out by the forward docking gang at 1320, then the aft docking gang put its first line out sometime after 1320, right?

A. Yes, sir.

Q. And since, as you have told us, the aft docking gang on that occasion put out a total of five lines, that would

[fol. 12] mean that between some time after 1320, when the forward gang put the first line out, until 1331, when the vessel was finished with engines and fast starboard side to the east side outer berth at 23rd Street Terminal, the aft gang put out a total of five lines; is that correct?

A. (No response.)

Q. Sometime during that period.

A. Well, roughly that time, yes.

Q. Well, that would indicate, would it not, that in ten minutes you got out five lines?

A. I wouldn't say ten minutes, no, sir.

Q. But that, of course, is what the log shows, does it not? 1320 to 1331?

A. Yes, sir.

Q. Eleven minutes?

A. Yes, sir.

Q. And the first line that went out was at 1320 and that was the forward station?

A. Yes, sir.

Q. You told us yesterday afternoon that moisture or water on a steel deck of a vessel will cause the vessel deck to be slippery to some extent; do you remember saying that yesterday?

A. Yes, sir.

Q. Now the log book under this same date, May 8, 1960, states as follows:

"1016"—that would be sixteen minutes after ten in the morning, is that correct?

A. (No response.)

Q. 1016?

A. Yes, sir.

Q. (Reading.)

"Stand by engines. Master at conn. Fog sets in. Lookout posted. Whistle sounded. Radar in operation. All fog rules obeyed."

Then at 1110, which would be ten minutes after eleven in the morning; is that correct?

A. Yes, sir.

Q. It says vessel proceeds cautiously in dense fog.

Then at 1200—that is 1200, which would be twelve noon, is that correct?

A. Yes, sir.

Q. It says: Weather cloudy and light fog.

Now there are no entries in here about weather while the vessel is docking.

[fol. 13] The next entry which makes any mention about the condition of the weather is at 1600, which would be four p. m., right?

A. Four p. m., yes, sir.

Q. It says: Overcast with light rain.

Now at the time this accident occurred to you the steel deck on the starboard side aft end of the vessel, the deck upon which you were working in part was damp, moist or wet at the time, was it not?

Mr. Friedman: Your Honor, I would like to take them, if I may, one by one, since they have different connotations.

Mr. Kimball: That is agreeable with me. I will withdraw the question.

Q. The decks were moist, were they not?

A. I cannot say. I am not sure of that.

Q. The decks had water on them, did they not?

A. Not that I recall.

Q. The decks were wet, were they not?

A. With paint.

Q. With water, I am talking about.

A. No, not that I recall.

Q. Do you recall these various questions and answers—

Mr. Kimball: Unless counsel will stipulate from page 37.

"Q. It was two o'clock in the afternoon when you actually slipped and fell, is that correct?

"A. Yes. I think it was still misty here in the harbor.

"Q. It was not a clear day, then?

"A. No, it was not."

To which you have added: "I don't think it was."

"Q. I thought before that you testified that it was.

"A. I am—I mean, the vision was clear, but it was damp.

"Q. Was the deck wet?

"A. It appeared to be wet; yes. Then after leaving Boston, taking those lines in, they dipped in to the water as [fol. 14] you were taking them in, all that water lies over the deck."

Page 38:

"Q. I am trying to find"—

Page 38:

"Q. I am trying to find out when you started this docking operation in New York, you say the deck was apparently wet, is that what you said?

"A. It appeared to be."

A question from page 40:

"Q. You say that you observed water on the deck, or is it that you do not remember whether you observed water on the deck of the vessel when the vessel came into New York on May 8, 1960?

"A. I know it was very slippery.

"Q. The question is, did you observe water on the deck either around the coils of line or in the area of the deck where you were working?

"A. There was no puddles of water. It's a flat deck.

"Q. But you say it appeared to be wet. I believe you said that before.

"A. It appeared to be wet, yes."

I will continue:

"Q. When you say it appeared to be wet, what do you mean by that?

"A. Well, it was extra glossy.

"Q. Could you see either beads of moisture on the deck?

And then he was interrupted.

"A. Moisture. That is what I am referring to when I say wet. I am referring to moisture. I don't know if you understood me when I said that before. It was moisture.

"Q. Sort of beaded with water all over the deck, is that right?

"A. Yes. It could have been oil in the paint. It could have been water. It could have been anything.

"Q. When you fell down on the deck you were pretty close to it at that point, were you not?

"A. Yes.

[fol. 15] "Q. Did you observe at that point whether the beads of whatever"—and again he was interrupted.

A. My hands were all wet. My pants were wet. The line itself was wet.

"Q. It was wet rather than covered with oil, is that correct? Your hands"—and again he was interrupted.

A. From water.

"Q. Your hands and trousers?

"A. From water, I'd say."

WALTER J. CHOWANIEC, called as a witness by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Friedman:

Q. Mr. Chowaniec, are you a seaman?

A. Yes, sir, I am.

Q. And for how long have you been employed as a seaman?

A. I have held seaman's papers from 1943, and I have been shipping quite regularly, I would say, for the past 12 years.

Q. And in what department have you principally sailed?

A. I have sailed in the deck department, principally.

Q. Now, in what particular capacity over the last few years—I don't want to go all the way back to '43 or '4, but in the last three or four years?

A. As deck maintenance and as boatswain.

• • • • • • •

Q. Do you recall when you were employed aboard the SS Mormacwind?

A. Yes, sir, I do.

Q. Could you tell me the dates, if you recall those, or if you have some certificates of discharge which would help you, refer to those?

A. I was first employed aboard the Mormacwind in '49, and I had steady employment there until, I believe, July, the first week in July of 1961.

[fol. 16] Q. Did you say 1955?

A. '59. I was employed aboard the Mormacwind until about July—the first week in July of '61.

* * * * * * *

Q. Now, Mr. Chowaniec, going back to your employment aboard the SS Mormacwind from '59 through 1961, during the voyage from February 9, 1960, through May 10th of 1960, you were employed aboard that vessel; correct?

A. I was.

Q. And during that particular voyage, what was your capacity?

A. As able seaman.

Q. Do you recall, if you do, what particular watch you worked?

A. I was on the 4-to-8 watch, also on the 12-to-4 watch.

Q. And with regard to your docking station, that is to say, your regular docking station, which area were you regularly or customarily assigned to?

A. If I was aboard on this particular trip on the 4-to-8 watch, my docking station would be on the bow or forward.

Q. On May 8th of 1960 there was a dock call, according to the records, at 12:40 as the vessel was coming into a Brooklyn pier. Do you recall to which section of the vessel you first reported as a result of that docking call?

A. I reported to the bow section.

Q. What, if anything, happened after you reported to the bow section with regard to yourself?

A. Our telephone rang. The third officer on the after station requested aid of one of our men from the forward section to come aft.

Q. And who was in charge at the bow station where you were?

A. The second officer, McKeller.

Q. What order, if any, did he give to you at that time?

A. He says, "Walter, you are elected."

Q. And what did you do next?

A. I grumbled, I didn't like it, but I went back there.

Q. Now, do you recall whether there was a member of the crew on that SS Mormacwind by the name of Mr. [fol. 17] Whitaker?

A. Yes. He was one of the ordinaries. I don't recall on which watch it was though.

Q. Do you know or recall which station he was regularly assigned to with regard to the bow or the after end as to the docking operation?

A. He was on the after section; that's all.

Q. When you got back to the after station on May 8, 1960, was Mr. Whitaker there?

A. No, Mr. Whitaker was not.

Q. Do you happen to know where Mr. Whitaker was at that time?

A. He was hospitalized at that time.

Q. He was in the ship's hospital?

A. Yes.

Q. Now, do you recall a member of the crew by the name of Jackson?

A. He was an AB, I believe, at one time on the 8-to-12 watch, and then on the 12-to-4 watch.

Q. And at the time on May 8, 1960, what was his regular station, forward, on the bow, or aft, in the rear?

A. He was aft.

Q. And when you got back there on May 8, 1960, was Mr. Jackson there?

A. Mr. Jackson was not there.

Mr. Friedman: May I, with the Court's permission, just read to the jury from the exhibit, Defendant's Exhibit A, the deck log for May 8, 1960, from noon to 2, "Helmsman, Jackson."

By Mr. Friedman:

Q. Would that indicate that Mr. Jackson was on the bridge handling the wheel during that time period?

A. Yes, sir, that would.

Q. And of course noon to 2 would be 1200 to 1400; correct?

A. That is from 12 to 2.

Q. Do you recall what you first did when you got to the after station?

A. Our first order there was to get the springwire—springwire ready for putting ashore.

[fol. 18] Q. And what did you do?

A. I made the heaving line fast to the eye of the wire, I proceeded out to slip it out through the chock to the lineman on the dock.

Q. Now, you are now talking about the first chock operation that you performed; correct?

A. That is correct.

Q. Now, I show you Plaintiff's Exhibit 2A and I ask you whether you find on the particular chock that you used for this first operation, letting out of what you referred to as the springwire?

A. Yes, sir, I do.

Q. Now, at the present time does it have any indication or number or letter or anything adjacent to it?

A. Yes. It has a 1 orange mark.

Q. There are two such chocks indicated with an orange 1; correct?

A. That is true.

Q. Now, one is farther aft than the other; correct?

A. Yes, sir.

Q. Now, of those two 1s, which is the chock you are referring to at the present time, the one that is farther aft or the one that is forward of it?

A. Forward of it.

Q. Of the two 1s then the one more forward?

A. Yes.

Q. Now, in the course of that operation, did you work alone or did anybody work along with you?

A. I was assisted by another AB.

Q. Do you recall who that was?

A. It was Mr.—I do not recall his name.

Q. Are you looking at him?

A. I am looking at the gentleman there.

Q. Is it Mr. Waldron?

A. Waldron is the name.

Q. Now, what was the next thing you did?

A. The next order was, after the wire is fast, "You take this new manila line that is coiled, start carrying it on the foredeck. We are going to put out one more line."

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[fol. 19] Q. Mr. Chowaniec, you received an instruction to use one of the lines forward, you so told us a moment ago; correct?

A. Yes, sir.

• • • • • • •

Q. Now, precisely, if you recall, or in substance as best you can recall, what did Mr. Tarantino tell you to do at that time?

A. He says, "Walt, we have one line that we must take as far forward as possible." He said, "I want you to get that line and take it down to the deck and bring it over to the edge of No. 4 hatch, put it out through that chock, and get it out as quickly as possible."

Q. Now, the particular chock that he instructed you to use, is that indicated on Plaintiff's Exhibit 2A now before you?

A. Yes, X-2.

Q. Does it have any number next to it?

A. 2.

Q. After you received this instruction from Mr. Tarantino, what was the very next thing you did?

A. I told him I would need help, so he directed Mr. Waldron to assist.

So I pulled the splice, the 10-foot eye splice, and the large foot of about 15-foot of slack threw it over one shoulder and over the other, and I had Mr. Waldron take off a few turns to give me slack and momentum so I could proceed down the deck rapidly, or as fast as I could, to the area marked here 2X.

Q. Go ahead. Just tell us what you did.

A. And after I felt that we had sufficient amount of slack, I said, "Here goes." Mr. Waldron was about 10 feet behind me pulling off the slack of a coiled line which was about four foot of height.

I proceeded down the deck, bulling my way, as I was the biggest man on the after section, and I could possibly be the strongest. I continued on, when I noticed that there was a bit of strain coming on this line. So I tried leaning into the weight of it, leaning forward, and to pull more slack, and I got as far as the bitts, and that was where I was pulled back from lack of slack.

[fol. 20] Mr. Waldron's job there was to give me more slack. Evidently he—

Q. Just tell me what you actually observed, Mr. Chowaniec. What then did you observe next, if anything?

A. When I was yanked back from lack of slack, I glanced sidewards, as the deck was tacky and I didn't want to lose my good footing—I glanced sidewards, about, I would say, a 45-degree look, and Mr. Waldron was in the process at one time of pulling this slack off this line, and he was about 15 feet from the coil, and this line was coming down sort of in a loop; and I went forward a bit further, I would say possibly 10 feet, when again I was brought up short; not enough slack.

Q. At that point what was your location with regard to the chock indicated by the number 2?

A. I would say I was just about even with the position marked 2.

Q. Go ahead.

A. And I glanced back, and Mr. Waldron was lying on the deck on his back alongside of the line.

I became rather angry, as I know this job requires speed and much slack, so I dropped my eye at the position marked 2, raced past Mr. Waldron and the line, and got to about 10 feet from where this coil is, and I grabbed more slack and proceeded back on the deck.

Then I went to my position marked 2, where the eye was, put it through the chock, made a heaving line fast, hollered to Mr. Waldron, "Feed the slack steadily to me. I'll need at least 150 feet."

And at that time he started to give slack while I was feeding it out through the chock to the lineman on the dock.

Q. Mr. Chowaniec, at the time that you saw Mr. Waldron on his back on the deck, can you tell me where on the deck that was? Is there any indication at the present time on Plaintiff's Exhibit 2A, just approximately, if you can?

A. I would say it was about half way between positions marked 1 and 2.

[fol. 21] Q. Now, in that section of the deck from where there is a circle with the R in it to the chock marked No. 2, can you tell me whether that area of the deck at that time, on May 8th of 1960, had any gratings on it?

A. No, sir. There were no gratings on the main deck at that time.

Q. By the way, this line that you were using, where was it coiled. Is there any indication on the exhibit, Plaintiff's Exhibit 2A?

A. Right alongside of the position marked 1, circled here in orange, marked R.

Q. That is where the line was piled?

A. That is where the line was coiled.

Q. When you raced back from chock 2, did you go all the way to that orange-circled R position?

A. No, sir.

Q. What?

A. No, sir.

Q. Would you tell us then where you did go?

A. I stopped about 10 to 15 feet from that coil and proceeded to grab with one hand and throw it in the air and

pull it with the other hand to get the amount of slack that I thought I would need.

Q. At that point where was Mr. Waldron, if you recall?

A. He was somewhere beyond me. I would say 10 or 15 feet behind me.

Q. You were heading in an aft direction, weren't you?

A. Yes.

Q. When you went from chock No. 2 to this position, 10 feet from the circled R, did you pass Mr. Waldron on the way?

A. Yes, sir, I did.

Q. And what was his position at that time as you came by him, if you observed?

A. He was in the process—he was on the side, coming up with one hand in the other and the other hand picking himself off the deck.

[fol. 22] DEWEY DARRIGAN, called as a witness by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Friedman:

Q. Captain Darrigan, for how long have you been employed and active in the maritime industry?

Mr. Kimball: If your Honor please, I wasn't aware he was in the maritime industry.

A. At least forty years.

The Court: Ask him what his employment is, his past employment, and so on.

Mr. Friedman: That is what I am trying to do, your Honor.

Q. And during those past forty years can you tell me what you started as?

A. I started as a seaman in 1914.

Q. And in what capacity as a seaman?

A. As a seaman.

Q. What would be called now an ordinary seaman?

A. An ordinary seaman, yes.

Q. And did you sometime thereafter become a licensed officer?

A. Yes, sir.

Q. And when did you become a licensed officer?

A. In 1924.

Q. And what was your first license, in what capacity?

A. As a third officer.

Q. Third mate?

A. Yes, sir.

Q. And was this obtained by virtue of going to any merchant marine academy or did you, as they say, work your way up from the forecastle?

A. I worked my way up, sir.

Q. Now, thereafter did you have other posts and positions in the maritime industry?

A. Yes, sir.

[fol. 23] Q. And at the present time what licenses or certificates do you hold? What rating?

A. I have a master's unlimited license, fifth issue.

Q. Master's unlimited what?

A. License of the fifth issue.

Q. Just what does that mean?

A. That means I am at it twenty years, twenty-five years.

Q. And does that mean that you can be a captain of any vessel? Is that the unlimited part of it?

A. Yes, sir.

Q. Including on the high seas or just in port or what?

A. On the high seas, sir.

Q. And for how many years did you actually serve as a master, a captain aboard American Flag vessels?

A. Ten years, sir.

Q. What branch of the Service were you in during the war?

A. I was in the navy, sir.

Q. What type of work did you do in the navy?

A. I was a cargo-operations officers in the South Pacific.

Q. And what grade did you hold?

A. Lieutenant senior grade.

Q. What has been your most recent employment?

A. I work for the United States Government, Department of Commerce, for the last five or six years.

Q. And in what particular department thereof or section?

A. My title was ship-operation assistant.

Q. And was there a branch of the Department of Commerce that you worked for?

A. Yes, sir. They called it the Maritime Administration.

Q. And what did your duties for the Maritime Administration call upon you to do?

A. They consisted of the surveying of all government-owned or subsidized vessels.

Q. What does that mean?

A. Well, I made physical surveys of vessels to see that they were maintained in their proper condition and I surveyed them on dry dock and a physical survey, as we call it, a physical inspection.

[fol. 24] Q. You would actually go down to the vessels yourself personally?

A. Yes, sir.

Q. Are you familiar with C-3 vessels, those types of vessels?

A. Yes, sir.

Q. Do you recall—if you do—whether you ever had occasion to be on the S.S. Mormacwind?

A. It's possible, sir.

Q. In what capacity?

A. As a surveyor.

Q. And do you have any recollection as to the time period involved?

Mr. Kimball: If your Honor pleases, we have an answer. The witness says "it's possible," and I assumed that counsel was not going to try to build anything from that. Now, I object to the question.

The Court: I will sustain the objection.

Q. Captain Darrigan, I am handing you Exhibit 2-A and I want you to assume, sir, that that is a copy of a section of the blueprint of the S.S. Mormacwind, of the main deck, here referred to as the shelter deck, the aft section thereof, essentially as she appeared on May 8th of 1960.

Now I am going to ask you to assume the following facts with regard to the markings that you see there.

First there are the various chocks which have arrows leading to them around on both sides, the starboard and the portsides of the vessel.

Now from the stern going forward there are four sections in red. Each of those lines refers to a section where there was rope flayed out on the afternoon of May 8, 1960, and also, or underneath the rope, there were wooden gratings underneath that rope.

There has been testimony that in the area behind this green line that is somewhat further forward than those for red lines there were gratings placed that covered approximately fifty per cent or so of the stern area.

[fol. 25] In any case, the area where the four red lines, where the lines were, was covered with gratings.

Now I want you to further assume, Captain, that at the circular portion where there is an R in the circle, right up there, that there was a Manila line coiled there which Manila line—this is, of course, just a short section of it—the line was much lengthier—which line was of a dimension similar or a shade thicker than the line that I am presently showing you, Exhibit 29.

Now I will ask you to further assume that the red section further forward which has the word "wire" next to it, there has been testimony that a spring wire was laid there and that the slanted lines in front of that, I believe black—

Mr. Friedman: I must say, your Honor, that I am slightly color blind.

Q. (Continuing)—indicates an area where there may have been some deck cargo, what has been referred to as red-label cargo in that area, and I think that is all I need to ask you to assume now as to the layout of the vessel.

Now, Captain, I would like you to assume that on May 8, 1960, in the afternoon, at approximately one-thirty in the afternoon, this vessel was in the process of coming into the New York Harbor and of being tied up at a berth known as Pier 23 in Brooklyn.

Now I would like you to assume that aft there were several men—part of the aft gang, docking gang—who were in charge of the third mate, who was present and in charge there, that a line was put out, among others, at the aft chock here that has a No. 1 near it, and also at the other aft chock, which also has a No. 1 next to it, and that then the third mate gave an instruction that the Manila line that I just indicated of that type, which was coiled at the area, the orange circled R, be put out through a chock that was farther forward, which has the No. 2 next to it.

[fol. 26] Do you see that, Captain?

A. Yes.

Q. Now I want you to assume that we have measured that on this scale drawing here and that the distance from the coiled rope to this chock No. 2 was approximately 56 feet.

Now my question to you is this, Captain: Assume all those facts and assume that the deck between where the rope was coiled in chock No. 2 was in all respects a perfectly normal deck; that there was no particular obstruction between the two points and assume that it was dry and had nothing unusual in terms of its surface. I want to assume that.

Now, Captain, do you have an opinion as to what safe and prudent seamanship would call for as to how many men should be assigned to the task of taking the line from where it was coiled at the mark R to the chock No. 2 and putting it out to that chock?

Mr. Kimball: Objection, if your Honor pleases. I would like to be heard at some length on this unless your Honor is going to sustain the objection.

The Court: Well, I think you should be heard. I just think that possibly the matter should be discussed at the side bar.

Mr. Kimball: I think it would be better, if your Honor pleases.

(The following proceedings took place in the robing room:)

The Court: Mr. Kimball, would you state the grounds of your objection?

Mr. Kimball: Thank you, sir.

The first ground of the objection, if your Honor pleases, is that the question seeks to elicit testimony which is irrelevant and immaterial in that on the basis of the evidence thus far in the case it appears as a matter of law that any [fol. 27] claimed shortage of personnel was not a proximate cause of the accident.

Secondly, if your Honor pleases, the testimony thus far elicited shows that at the time the accident occurred there was no shortage of personnel at the after docking station; indeed, although they had no more men than would normally be required at that time of day, they had more superior manpower than they normally would have had because the ordinary seaman, I believe, on the eight-to-twelve watch, was in the ship's hospital and in place of him, according to the evidence thus far in, were Mr. Chowaniec, an able-bodied seaman, a superior rating, who, by his own admission, is a competent merchant mariner of considerable experience, size, strength, and so forth.

So, if your Honor pleases, these are the two primary bases for my objection.

Additionally I would submit to your Honor that an insufficient foundation has been attempted to be laid for elicit-

ing an opinion from this witness on this particular matter in that it seems perfectly obvious that a great many more factors would have to be known by anyone before they could answer the question.

The situation is necessarily a varying one, depending upon the manpower available, what the other men were doing, what the docking situation was at the time, the nature and extent of such emergency as there may have been for the work to be required, and so forth.

It seemed perfectly apparent that if for any reason an emergency had arisen in connection with docking the vessel then the vessel would come first over and above any manpower situation that might have existed and, therefore, un-
[fol. 28] der that hypothetical situation, the safe practice would dictate that they use anybody who might happen to be handy to avoid, for example, the vessel plowing into the pier and doing extensive damage to herself, her cargo, her personnel, and heaven only knows what.

Without knowing all of the factors, the relevant factors which the mate should have taken into consideration at the time, I respectfully submit to your Honor that it would be improper to permit this witness to speculate as to what safe practices may have been under some theoretical situation which we don't know anything about because it is in his mind.

The Court: I don't want to interrupt but this is a hypothetical question that he is asking now. You are at liberty to ask your own hypothetical question on cross examination.

On a matter of relevance, I will permit the question.

One of the claims made here is, as I understand it, that failure to supply a sufficient number of men on this particular operation, assuming that that had any bearing on the injuries to the plaintiff, constituted unseaworthiness.

There has been testimony on the subject as to the number of people who were there, whether they were available. These are matters in part for summation to the jury, but I think so far as the question is concerned that I will allow it and I also will allow, so that we may not have to go

through a further conference in the robing room, that if a further question is asked along the lines referred to in the case there is a decision by Judge Friendly that Mr. Friedman has submitted, and while I am expressing no opinion myself I will allow the question, and you are familiar with what I am talking about.

[fol. 29] Mr. Kimball: No, I am not, sir. I don't know what case Mr. Friedman has cited.

The Court: Well, I assumed that he had been giving you copies of memoranda that he submitted to the Court.

Mr. Friedman: Of course I did. I don't know whether he reads them.

Mr. Kimball: Well, whatever it is.

But, if your Honor pleases, I will make my objection at the time.

The Court: All right. I thought if you were familiar with that—

Mr. Kimball: Would your Honor permit me a voir dire on this man at this time to find out whether—

The Court: He has had experience in docking and things of that nature.

Mr. Kimball: Yes.

The Court: As to his qualifications, I will permit it.

Mr. Kimball: How about whether there were other factors which he would necessarily have to know in order to answer the question?

The Court: No.

Mr. Friedman: Your Honor, this man has testified—I tried to be as brief as possible, though it does me no good in this case—as to his qualifications.

Now if your Honor thinks there is such a question still overhanging a man with his type of qualifications then I will evoke it myself. I do not want Mr. Kimball to intrude into my direct examination. I think his qualifications as stated do not call for any voir dire at this point.

The Court: Well, it might, as to the qualifications, but I thought that you have covered it fairly well—his qualifications.

[fol. 30] Mr. Kimball: I don't want a voir dire on his qualifications but I would request permission, on the voir dire, to inquire as to whether there aren't thirty or forty or fifty factors which he would necessarily have to take into account before he could answer that question.

The Court: No.

Mr. Kimball: Now your Honor tells me I can do that on cross examination but I respectfully submit, sir, that by that time the damage will have been done and while it is theoretically nice to ask the jury to erase things from their minds as a practical matter they cannot.

The Court: No. Don't misunderstand me. It is in the nature of cross examination, but it would be permitted immediately following the witness's answer. You could then examine him as to that. This is the way I have always understood it. You have your qualifications of your witness. You have had that. Assuming they are satisfactory, then you have your hypothetical question. That has been asked and ruled on.

Now after he answers you may then—whoever has called him—examine as to the basis.

Mr. Kimball: That is exactly what I intended to do.

The Court: Examine him as to the basis for his opinion. You may bring that out on your examination.

Then you have whatever expansion results from the findings of the basis and then you have your cross examination. That is the standard method which I don't feel I am going to depart from.

Mr. Kimball: Would your Honor, then, ask that there be included in Mr. Friedman's hypothetical question the [fol. 31] facts or the substance of the testimony of Chowaniec, that he had this quantity of line on his shoulders and went down the deck with it and later on, when he got excited, he went back and he tossed portions of this line into the air with one hand and that later on the plaintiff in this case, who supposedly had fallen and injured his back, was observed taking coils of line out one-handed? That is all in the case, I submit.

The Court: I know but counsel has a certain choice in what he includes in his hypothetical question and he is not required to include everything as long as he doesn't include anything that is not true.

In other words, he cannot include something there that is not in the evidence.

Mr. Kimball: I submit equally well, your Honor, he cannot exclude from this hypothetical question anything which is in the evidence which has a relevant bearing upon the matter.

The Court: Well, there we part company. I disagree with you on that. There we part ways.

Mr. Friedman: Your Honor, I hate to prolong this but it may save us another conference.

I want to point out that our thrust, the thrust of our theory here, is that there was an insufficient number of men assigned to this particular task of getting the rope from the circled R to chock No. 2. There could have been a hundred men on the stern, or five. It is a question of how many men were assigned to this particular job. That is No. 1.

No. 2: I would like to point out to the Court that our theory here relates to the manpower. It has nothing to do with the manpower available for the job and it has to do [fol. 32] with whether enough men were provided. And as to that the de Lima case, your Honor, is right on the point, regardless of whether there were six men in the gang or what other considerations or factors there were: Should this job have more than two men? That is the thrust of our theory. I don't think other factors come into play.

Mr. Kimball: The thrust of our position is that if they had sufficient men at the aft end of the docking station, but if the third mate did not utilize those men, distribute them among the two tasks being done, in the proper manner, then that would only impose liability upon the defendant if the plaintiff could show, No. 1, that the third mate was negligent, or, No. 2, that the third mate was so incompetent as to cause the vessel to be unseaworthy.

Now neither of those things has been shown, nor will they be shown, because they cannot be shown. They cannot show that this third mate was negligent in assigning, we will say, two men to this particular line without showing what other demands were being made upon the mate at that time. For all anybody knows he may have had seven tugs colliding with him on the portside; he may have had dozens of other needs and demands placed upon him. He may have received orders from the bridge to do precisely what he did for good reason or bad reason.

But there can be no proof of the mate's negligence and I don't think counsel would even attempt to prove that he was incompetent.

So that is the defendant's position on this particular question, your Honor.

The Court: Very well. We will resume.

(The following took place in the hearing of the jury:)

[fol. 33] The Court: The reporter will read back the question.

(Question read.)

A. Yes.

Q. What is your opinion?

Mr. Kimball: Same objection.

The Court: Same ruling.

You may answer, Captain.

A. I would say to drag a line sixty feet or more you would need three or four men at least of that type and weight.

Q. Captain, just so that we are clear, the measured distance from the center of the R is 56 feet. Does that change your answer at all?

A. No, no.

Q. Now can you explain to us, Captain, the basis or the reason for your opinion?

A. Well, these lines are heavy. I would—just looking at this I would figure that that is an eight-inch mooring line and to drag it along the deck or along the street, there is a lot of physical strength needed.

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Q. Captain, can you tell me with regard to the basis of your opinion, does the direction of the movement of the rope play any role?

A. No. The distance is the same.

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Q. Now, Captain, is there a phrase with regard to the use of rope known as calling or called rope, and also a phrase known as flaked?

A. Yes, sir.

Q. What are these two phrases? What do they mean?

A. Well, a flaking of the line means that the line is taken from the coil and flaked along the deck, which is more convenient to handle when you are mooring the vessel.

[fol. 34] Q. Well, when it is flaked, Captain, what does that mean? Is it still in a circular coil, is it in some sort of straight-line position, or what?

A. Yes. It is more or less in a figure-of-8 line, but it might extend eight, ten, fifteen feet along.

Q. And is the line laid, when it is flaked, on top of the other strands or is it one level?

A. On one level.

Q. And in terms of making ready for a mooring or docking operation, customarily, Captain, where is the line flaked in terms of the chock that is going to be used with that particular line?

Mr. Kimball: Objection, if your Honor pleases.

The Court: What is the basis of the objection, Mr. Kimball?

Mr. Kimball: Well, one of the things, if your Honor pleases, is that the captain is not being told that this is new line.

The Court: I assume that this is a matter that you will bring out on cross examination.

By Mr. Friedman:

Q. Right now we are talking about customarily, Captain, if you would be so kind.

Customarily can you tell me where the line is flaked out in terms of distance from the chock to be used?

A. It is customary to flake the lines as near the chock as possible.

Q. And what is the purpose of that?

A. So that it is easy to handle.

Q. And who in the hierarchy of the ship's personnel customarily is responsible for seeing to it that the line is so flaked out?

A. The officer in charge of the mooring deck.

Q. And in the case of the S.S. Mormacwind on May 8, 1960, as to the stern or aft section, that would be the third mate?

A. I said it was, sir.

[fol. 35] Q. All right. Now this flaking out of the line customarily, when is it done in terms of the time period of the docking operation?

A. Well, I would say about twenty minutes before you were close to the pier. That would give you a chance to know which side you are going to moor to the dock and you could flake your lines accordingly.

Q. Now, Captain, customarily would the officer in charge of the particular docking gang be responsible to know and to determine fifteen or twenty minutes before he actually started putting out the lines just which chocks were going to be used in the docking operation?

A. I would say yes.

Mr. Kimball: Objected to, if your Honor pleases. There is no basis for that.

The Court: This is customarily.

Mr. Kimball: I object to it.

The Court: What was the custom? That is what I understand the question was.

Is that not so, Mr. Friedman?

Mr. Friedman: Yes, customarily what would be the procedure.

Q. Now I am going to ask you, sir, to assume the same facts that you previously assumed about the S.S. Mormacwind. I won't take your time or the time of the Court and the jury to repeat them, and I am going to ask you to assume that the docking operation actually began aboard the S.S. Mormacwind on May 8, 1960, in the sense that the first lines were put out through the chocks that are indicated by the No. 1 and that after these lines had been put out through the chock marked No. 1 it was then that the officer in charge, the third mate, gave an instruction that the chock, some fifty feet or so farther forward, chock No. 2, be used for the docking operation, and that at that time, when he gave that instruction, the line that he di- [fol. 36] rected be used for that purpose was coiled, not flaked, and was situated some 56 feet from the chock.

Now I am going to ask you, Captain, do you have an opinion as to whether that situation and those preparations or lack of preparations for the conduct of the docking operation, whether you have an opinion regarding that as to whether it constituted safe and prudent seamanship.

Mr. Kimball: Objection, if your Honor pleases, for the reasons stated extensively in the robing room.

The Court: Overruled.

Q. Do you have an opinion, Captain?

Just at this time, if you will—I know you are not familiar with our procedure—

The Court: Just answer yes or no if you have an opinion.

Q. At this point I am asking you if you have an opinion on that subject.

A. I have an opinion, yes.

Q. Now, Captain, would you tell us what your opinion is?

Mr. Kimball: Same objection.
The Court: Same ruling.

A. I would say that the carrying of the line, as I said before, still needs three or four men on account of the distance there. It is quite a problem.

Mr. Kimball: I move to strike the answer as not responsive to the question, your Honor.
Mr. Friedman: I will accept that, your Honor.
The Court: Yes. Strike the answer and repeat the question.

Q. Captain, I am directing—

[fol. 37] Mr. Kimball: Excuse me, if your Honor pleases. I wonder if Mr. Friedman might listen to your Honor's request that the question be read again to the witness rather than put another question to the witness. We have one now.
The Court: I just struck the answer. I overruled the objection to the question. If you want to ask another one, I might sustain the objection.
Mr. Friedman: I just want to supplement it by directing his attention to something. That was the purpose, your Honor, rather than taking the time to repeat the question.
The Court: I would prefer to have the reporter read the question.
Mr. Friedman: Surely.

(Question read.)

The Court: I believe the question was as to whether you had an opinion as to whether it was safe and prudent seamanship, or something to that effect.
Mr. Friedman: Yes, with regard to the preparation for the docking operation.

• • • • • • •

A. My opinion is that this was an unsafe operation.

* * * * * * *

Q. Captain, can you tell me what in your opinion safe and prudent seamanship called for under the conditions I have described on the S.S. Mormacwind with regard to coiling or flaking out the line to be used at chock No. 2?

Mr. Kimball: Objection to the question on the grounds stated in the robing room.

The Court: Well, I have overruled the objection on that ground.

[fol. 38] Q. Do you understand the question, Captain?

A. No. Repeat it, please.

(Question read.)

A. Preparing the ship for docking, this line that is coiled there, as indicated, should have been flaked along the deck as close as possible to this chock No. 2.

Q. Thank you.

Now, Captain, assume in addition to what I have already told you that a line to be used, that was coiled at this circled R, was new line rather than old line. Does that in any way change your opinion?

A. No.

Q. Now, Captain, can you tell me what in your opinion would be the effect on the men handling the line in terms of the heaviness or difficulty or lack of difficulty of handling that line and doing that job, of having the line flaked out rather than coiled some 56 feet away?

Mr. Kimball: Objection, if your Honor pleases.

The Court: I will permit it.

A. What is the basis for—

Q. No, listen to the question, if you would, Captain.

(Question read.)

A. The line would be quite easy to handle if it was flaked out.

Q. Now, Captain, in terms of your first opinion here, that three to four men should have been assigned if the line was to be moved some 56 feet, you were not told how many, if any, other men were present at the stern of the vessel at that time, is that correct? You were not told that?

A. No.

[fol. 39] Q. Now, in terms of the number of men that in your opinion safe and prudent seamanship called for assigning to that particular task of moving that line that 56 feet, does it make any difference as to how many other men were in the stern or stern vicinity of the vessel?

A. No.

* * * * * * *

Cross-examination.

By Mr. Kimball:

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Q. Well, Captain, can I get a positive answer, a yes or no from you, that the number of men depended upon to safely move an object would depend necessarily upon the size of the object?

A. I would say yes.

* * * * * * *

Q. Well, now, Captain, this third mate, who I will ask you to assume had command of the aft docking station of the Mormacwind on this particular date in the afternoon of May 8, 1960, this fellow, would you agree that he would have responsibilities for the safety not only of the men who were under his immediate command but also to some extent for the vessel and everybody and everything on the vessel? Would you agree with that?

A. Yes.

Q. And also for the pier and everything and everybody on the pier, he would have some responsibility for that as well?

A. I would think so.

Q. In the event, as the log shows, that the vessel was being docked with the aid of assisting tugs, he would have this third mate, the responsibility for the safety of the tugs and the men on those tugs?

A. Right.

Q. And, of course, this third mate had a limited number of men under his command, correct?

A. I don't know, sir.

Q. Well, you didn't assume that he had the entire crew back there with him, did you?

A. I don't know how many men he had, sir.

[fol. 40] Q. Well, you would not normally expect the whole crew to be back in the aft docking station, would you?

A. Not generally speaking.

Q. Well, I will ask you to assume that he had back there with him four able seamen and an ordinary seaman and that for this time of day that was the normal number of men assigned to the after docking station on a C-3 vessel such as this. I want you to assume that, if you please.

A. Right.

Q. Five men.

A. Right.

Q. And on this particular occasion there were four able seamen and one ordinary seaman.

Now, don't you agree that what was safe and prudent seamanship at that time with respect to the third mate and the after docking station necessarily depended upon the safety of all of these various things which I have mentioned to you, namely, the men themselves, the whole vessel, and contents and crew, the tugs, the pier; right?

A. Right.

* * * * * * *

Q. Captain, assume an order was received by the third mate to put out an additional line astern, in the normal course of operations the mate would probably have competing demands upon his personnel, would he not?

A. Could be.

Q. And the nature of these competing demands would necessarily have a bearing upon the number of men to be assigned to put up the additional line, would it not?

A. Right.

Q. In the hypothetical question which was given you you were not told of any competing demands upon the mate's available manpower, were you?

A. Are you asking me?

Q. Yes.

A. Well, I don't know what went on.

Q. Well, certainly if the mate, the third mate, received an order from the bridge to assign one or two men to put [fol. 41] out an additional line it would be prudent and seamanlike for the mate to obey that order, would it not?

A. Correct.

* * * * * * *

Q. Now would you say, Captain, that three or four men would be required to handle a line which one man in fact handled in the following manner over what this same man described as a tacky deck surface? In other words, a deck surface which was not in its normal condition so far as footing was concerned. This man handled the line as follows:

And my question is bearing this in mind do you still believe that it would require three or four men in order to flake the line or pass it through the chock, to have what has been described as safe and prudent seamanship?

Reading from page 17—

* * * * * * *

"So I pulled the splice, the ten-foot eye splice, and the large foot of about 15 foot of slack, threw it over one shoulder and the other, and I had Mr. Waldron take off a few turns to give me slack and the momentum so I could proceed down the deck rapidly or as fast as I could to the area marked here 2X.

"Q. Go ahead. Just tell us what you did."

Then it is marked "Q" but I believe it should be "A."

"A. And after I felt that we had sufficient amount of slack, I said, 'Here goes.' Mr. Waldron was about ten feet behind me pulling off the slack of a coiled line which was about four foot of height."

Mr. Kimball: I would like the record to show that the sentence which I am about to read again is the one I have been directed to read by the Court.

"Mr. Waldron was about ten feet behind me pulling off the slack of a coiled line which was about four foot of height."

[fol. 42] Continuing now:

"I proceeded down the deck bulling my way as I was the biggest man on the after section and I could possibly be the strongest."

Now I am going to skip because the part I am interested in for purposes of my question on cross-examination appears on page 20.

"Q. Will you tell us then where you did go?

"A. I stopped about ten to 15 feet from this coil and proceeded to grab with one hand and throw it into the air and pull it with the other hand to get the amount of slack that I thought I would need."

Now bearing that question in mind, which I ask you to accept as being true, do you nevertheless feel that safe and prudent seamanship dictated that three or four men be assigned to take this line from the place marked with the R to the chock marked with the 2?

* * * * * * *

A. I do.

Q. Do you agree that these competing demands on the third mate in so far as the safety of the operation, the

overall operation was concerned, would have a bearing upon which chock was used to put a line out?

A. It is possible.

Q. And, of course, for those on the bridge, those same competing considerations would have a bearing as to which chock would be used for the purpose of letting go the mooring lines; is that correct?

A. Correct.

Q. Do you agree that in view of all these competing considerations the appropriate chock to be used would depend upon a great many factors?

A. Yes.

* * * * * * *

Q. Well, the question is do you agree that in five minutes you, a master mariner, could list at least 25 factors which would necessarily have to be taken into consideration by [fol. 43] whoever was in charge of that operation in order to properly dock the ship?

A. I wouldn't say 25.

Q. What about the state of the tide?

A. (No response.)

Q. Would that be a factor?

A. It would be a factor, sure.

Q. What about the condition of the current in that area, would that be a factor?

A. What is the tide? The tide is a current.

Q. I don't know.

A. The same thing; same thing.

Q. Please don't ask me the questions.

The Court: Would the tide be a factor?

The Witness: Sure. Yes.

Q. And Mr. Friedman didn't tell you what the tide was, did he?

A. (No response.)

Q. You don't know know anything about the tide, do you?

* * * * * * *

A. I do. I know about the tide. Nobody asked me about it.

Mr. Friedman: Is the question—so that I understand it, your Honor—is the question as to whether the tide would be a factor in determining whether to use more than two men for the particular task of letting out the line? Is that the question?

The Court: I don't understand it as such.

Mr. Kimball: The question, if your Honor pleases—

Mr. Friedman: There is no relevancy if that is not the question. There is no relevancy to his comment about my not asking him that.

Mr. Kimball: The question, I believe the record will show, is whether the condition of the tide is not a factor which whoever was in command of the operation would necessarily have to take into consideration in properly docking the ship.

[fol. 44] The question assumes that the proper docking of the ship would necessarily involve a determination of which chocks to use, which lines to use, which direction the lines should go, et cetera, et cetera, et cetera.

Mr. Friedman: Your Honor, I object to the question since the only question we have in this case is how many men should have been assigned to move this line, and what other considerations the docking pilot had would have nothing to do with that.

The Court: Mr. Friedman, I will charge the jury as to the law in this case and what they have to consider in this case.

Mr. Friedman: I wasn't meaning, by any means, your Honor, to presuppose the province of the Court. I respect that completely. I just wished to state the grounds of my objection.

The Court: Well, I have noted your objection and it is overruled.

Mr. Kimball: If your Honor will permit me to withdraw and state the same question:

Q. The question is whether in your judgment the condition of the tide would be a factor which, whoever was in charge of this docking operation, ought to take into consideration in determining how to properly dock the ship.

A. Definitely.

* * * * * * *

Q. Now with this suggestion I go back to a question I asked you earlier:

Don't you believe that if given ten minutes you could prepare a list of twenty-five common factors which the person in charge of this operation would necessarily have to take into consideration in order to safely dock the ship?

A. All of that is true, definitely.

[fol. 45] Q. And all of those various factors would have a bearing, would they not, upon whether the order given or presumably given to the third mate to do something was a safe and prudent and seamanlike order?

A. Right.

Q. Is that right?

A. Right.

Q. And similarly those factors would have a bearing upon whether what the mate did was safe, prudent and seamanlike?

A. Right.

Q. Now, in a docking situation it is not out of the question that some emergency situation might arise which would necessitate the use of additional lines, is it?

A. No.

Q. And in the event such a situation arose it is not out of the question that a line would have to be obtained from some place to be put out, right?

A. Right.

Q. In other words, what I am attempting to get from you, if it be the fact, from your opinion, is that in the course of a typical docking operation, because you have got all of these competing factors: You have got a number of

different vessels participating in a common operation; you have got a number of different men positioned at different places attempting to assist in bringing this big—and in that position—somewhat helpless vessel in unexpected events occur which necessitate some change in plan?

A. Right.

* * * * * * *

Redirect examination.

By Mr. Friedman:

* * * * * * *

Q. Now, Captain, you were asked yesterday about other factors to be considered in terms of the overall docking operation of such a vessel as the S.S. Mormacwind, and there was mentioned to you among other items the tide, the current, the winds, the number and type of propellers, the tugs, the hour, et cetera.

Now, Captain, do any of these matters in your view have anything to do with the question as to the number of men [fol. 46] safe and prudent seamanship call for to be assigned to the particular task of moving the line from the orange-circled R to chock No.2?

Mr. Kimball: Objection, if your Honor pleases.

The Court: Overruled.

A. I would still maintain my story of yesterday that you would need three or four men to move that line that distance.

Q. And does the question of what the tide was at that particular time or what the winds were at that particular time have anything to do with it?

A. Under general conditions.

Q. Captain, if you would just listen to my question:

Does the question of what the tide was at the particular time this work was being done or what the winds were have anything to do, in your opinion, with the question of the number of men to be assigned to that particular task?

A. No, sir.

Mr. Kimball: Same objection, if your Honor pleases.
The Court: The same ruling.

Q. Captain?
A. No, sir.

• • • • • • •

Q. In your opinion, Captain, would the question of what the tide was at that time or what the current or what the number of propellers were or any of those factors that were mentioned to you by Mr. Kimball: would they have anything to do with that issue of whether or not the rope should be flaked out? No, sir.

• • • • • • •

[fol. 47] Q. Now, Captain, I show you the log for May 8, 1960. Can you tell me from examining the log how long a period of time it took for the vessel to be tied up at Pier 23 on May 8, 1960?

• • • • • • •

Q. You don't have to read it. I am asking you, because the entries are in nautical terms, can you from reading the log tell us how long it took them to tie up the vessel on May 8th.

A. Eleven minutes.

Q. Now customarily, Captain, if any emergency occurs during the course of a docking operation related to the docking operation, customarily, Captain, would an entry be made in the deck log?

Mr. Kimball: Objected to, if your Honor pleases. I don't know what "emergency" means in relation to entries in the deck log.

The Court: I think the captain can state what an emergency is or what is an emergency.

If you want to ask him what he considers an emergency, you may ask him if that would be entered in the deck log.

Mr. Friedman: I selected the phrase because Mr. Kimball used it just that way without any further definition in his cross-examination.

Shall I proceed with the question as it is?

The Court: Yes.

Q. I believe you may answer, Captain.

A. If any emergency arose while the docking operation was in progress, it would be entered in this log book.

Q. If I recall correctly, I believe that Mr. Kimball asked you the same question with regard to any unusual event or events related to the docking operation.

[fol. 48] Mr. Kimball: Same objection, if your Honor pleases.

The Court: Same ruling.

Q. And I put the same question to you—

The Court: These are unusual events relating to the docking operation.

Mr. Friedman: Related to the docking operation.

Q. If any unusual events related to the docking operation occurred would they be customarily entered and recorded on the deck log?

A. Yes, sir.

Q. And, Captain, is there any entry that in your opinion reflects an emergency or unusual event relating to the docking operation recorded in the deck log of the S.S. Mormacwind on May 8, 1960?

A. No, sir.

Q. What significance, if any, do you attach, Captain, to the fact that the vessel was, according to its own log, tied up at the pier in eleven minutes?

A. Very good, sir.

Q. I am sorry?

A. That is a very quick docking, I would say, very quick.

Q. Would that log book indicate to you, Captain, that it was essentially a smooth operation?

A. Yes, sir.

Q. Captain, you were told on cross-examination that there were five men in addition to the third mate back aft in the course of this docking operation and they were under the command of the third mate, who was also there.

I believe you were also told that Mr. Waldron and the other man working with him, who was Mr. Chowaniec, on the particular line in question, were working on the starboard side of the vessel.

Now I want you to assume that the mate has stated—well, in any case, assume now, if you will, Captain, that at [fol. 49] the time these two men, Mr. Waldron and Mr. Chowaniec, were assigned to handle this line and put it out through chock No. 2, the other three men under the supervision of the third mate in the aft gang were not occupied with other tasks at that moment, and given that assumption, Captain, do you have or can you tell me whether that assumption has any effect on the opinion that you expressed earlier, that it was not safe and prudent seamanship to assign only two men to do the particular task Mr. Waldron was engaged in.

Mr. Kimball: Objection, if your Honor pleases.

Mr. Friedman: Your Honor, I would just like to indicate that I intend, after this question, to immediately—

The Court: Come up to the side bar.

Mr. Friedman: Surely.

(The following took place out of the hearing of the jury:)

Mr. Friedman: I intend, your Honor, after this question, to immediately put to him the other assumption regarding the three men, that they were completely occupied with other tasks, and I submit that the proof will be as follows—

The Court: He has already testified that the number of men available or not available would not affect his judgment. Now you are just asking him all over again—

Mr. Friedman: There is a reason for it, your Honor, and let me explain it, if I may. The proof I intend to elicit is this:

If the three men were not fully occupied then there is negligence on the part of the third mate in not directing one or more of those three to help Chowaniec and Waldron [fol. 50] If, on the other hand, the three men were fully occupied at the time, then the ship was short-handed back aft in the course of this docking operation.

Now, your Honor, that is the important point to bring out, that either way there is negligence or undermanning which, I respectfully submit, the Court will have to decide as a matter of law what the charge should be to the jury, that that would constitute unseaworthiness. That is the purpose of my question. It was brought out—the legal issue was remarked upon in the robing room sometime yesterday, and that is the sole point of these two questions; and then I am through with this witness.

The Court: All right. I will permit him to ask the question over your objection.

Mr. Kimball: Thank you, sir.

(The following took place in the hearing of the jury:)

By Mr. Friedman:

Q. Captain, given the various assumptions you have had before and, as I say, adding to that the assumption that the other three men—

The Court: Mr. Friedman, what are these assumptions, because we have had a lot of assumptions and it might be better for the jury to know what they are.

Mr. Friedman: All right, your Honor.

Q. Assume that on May 8, 1960, the vessel was being docked at approximately one-thirty in the afternoon at Pier 23 in Brooklyn and that Mr. Waldron was a part of the aft docking gang under the supervision of the third

mate and that there were four other men back aft in addition, making a total of five men, plus the third mate.

[fol. 51] Assume that two lines were put out through the chocks indicated with the No. 1 towards the stern of the vessel and then there was an order by the third mate that another line be put out through chock indicated as No. 2, which is farther forward.

Assume that the mate directed that the line to be used for that purpose was an eight-inch or a shade thicker line of the type that I showed to you yesterday and that that was coiled, that line was coiled approximately 56 feet from chock No. 2, that the mate instructed these two men to use; and that he assigned but those two men, Mr. Waldron and another man, Mr. Chowaniec, to do that job.

Now I am asking you to assume, if you would, that at the time that the mate instructed just Mr. Waldron and Mr. Chowaniec to do that particular task of putting out the line to chock No. 2 the other three men were not engaged in some task or tasks from which they could not be spared:

And I am asking you, sir, assuming that, do you have an opinion as to whether the mate's instruction to Mr. Waldron and Mr. Chowaniec to handle the line as described constituted safe and prudent seamanship.

Mr. Kimball: If your Honor please, I object.

The Court: Overruled. The objection is overruled.

I assume you rose to make an objection.

Mr. Kimball: I did, sir. I want to point out to your Honor that the assumption that the other men were not engaged is contrary to the evidence and violates common sense, which is another basis of my objection.

The Court: You may answer.

A. If the three men were not there then they were shorthanded at this assignment. Otherwise—

[fol. 52] Q. Captain, I hate to interrupt your answer but the question assumed that the three men were at the stern in the aft section but that they were not at that time oc-

cupied at tasks from which they could not be spared. That is the assumption at this time.

Now was the mate's instruction assigning just the two men, Chowaniec and Waldron, in your opinion, safe and prudent seamanship?

A. No, sir.

. . . . . .

Q. Now would you tell us the basis for that opinion, sir.

A. Many things could enter into this.

First I would say that they were shorthanded in that particular assignment. Again, I would say the officer was negligent in not assigning another man to help these other two men with that line.

Q. Now, Captain, I am going to ask you to take these exact same assumptions that I submitted to you just a moment ago without repeating them except that I am going to change the last assumption. I am going to ask you to assume that the other three men were in fact occupied with tasks at that moment that the mate assigned Chowaniec and Waldron to handle this particular line. They were occupied with tasks from which they could not be spared. Do you understand that? I am changing the assumption just the other way around. Do you understand that, Captain?

A. (No response.)

Q. Now, you have an opinion?

A. Yes.

Q. Do you have an opinion as to whether the situation then present under those circumstances constituted safe and prudent seamanship?

A. It might happen once in a while but I wouldn't consider it prudent and general practice.

Q. Could you explain your answer, Captain, so that I understand it?

A. I mean, there might be a case where you have to do a job with two men where it takes four to do it but that only happens once in a while.

. . . . . .

[fol. 53] Q. Now, Captain, assuming the layout and circumstances of the S.S. Mormacwind, as I say, assuming that the other three men were occupied at the time the chief mate gave the instructions to Waldron and Chowaniec with regard to this line, with the other two lines that had been previously put out through chock No. 1, there was testimony or indication that there had been an offshore line put out through the starboard side; assume they were occupied with that—one or more of those other lines—do you have an opinion as to whether the S.S. Mormacwind, on May 8, 1960, at that time, was sufficiently manned with regard to the aft deck docking gang?

You understand the question, Captain?

A. Yes, sir.

Q. And the answer, please?

A. No, sir. The answer is no.

Q. And, Captain, this is, I hope and I believe, my last question—

Mr. Friedman: Perhaps my record in not clear.

Q. You have told us that you have an opinion. What is your opinion, Captain?

A. On this mooring problem?

Q. What is your opinion as to whether the vessel was sufficiently manned with regard to the aft deck docking gang?

A. I said no.

Q. Just tell us the basis for that opinion. I don't want you to repeat anything you have told us before. Very briefly, what is your opinion? And that is my last question to you, Captain?

Mr. Kimball: His opinion is no and I assume that the basis is that there were not enough men, so I object to the question.

Mr. Friedman: I will accept Mr. Kimball's assumption as being what the captain would answer, and I have no further questions.

[fol. 54] Mr. Kimball: I have no questions.

Mr. Friedman: You are excused, Captain. Thank you.

(Witness excused.)

* * * * * * * *

(The following took place outside the hearing of the jury:)

MOTION FOR DIRECTED VERDICT

Mr. Kimball: If your Honor pleases, the defendant respectfully moves the Court for a directed verdict in the defendant's favor on the various and alternative grounds of failure of proof, insufficiency of proof, no issue of fact as to the non-liability of the defendant upon which reasonable men could disagree, and that the evidence conclusively establishes as a matter of law that the defendant is not liable—each and all of those alternative theories being directed to the following claims individually, as I understand the claims.

First the defendant moves in respect of the plaintiff's claim that the vessel was unseaworthy by reason of claimed shortage of personnel.

In support of this motion I would respectfully point out to the Court that, to begin with, the vessel was not short of personnel because according to the Coast Guard certificate she was only required to carry on deck in the unlicensed department six able and three ordinary seamen, and in addition to the six able and three ordinary seamen she had a bosun and two deck utility men so her articles, which are a plaintiff's exhibit, show that she had three more unlicensed deck crewmen than her certificate required.

Secondly, that she did have aboard at the time of the alleged occurrence, according again to a plaintiff's exhibit, the articles, every one of the deck crew who are shown on the articles.

Lastly your Honor will recall from the testimony—and it is undisputed—that the vessel docking between twelve

[fol. 55] noon and four p.m. or, indeed, between eight a.m. and four p.m., there would, in normal course, be one able seaman from the after docking station at the wheel acting as quartermaster and, accordingly, the full complement on the after docking station between the hours of eight a.m. and four p.m. would consist of five unlicensed members of the deck department under the command of the third officer. Those five would normally be three able and two ordinary seamen.

At the time of this alleged accident, and for some time prior thereto, there were in fact, according to the undisputed testimony, five unlicensed men at the aft docking station, but they were composed of four able seamen and one ordinary seaman, so that in point of fact the vessel was manned aft superior to what would normally be the case in that instead of having an ordinary seaman back there they had Mr. Chowaniec, who not only had a higher rating but, according to his own testimony, he was a very experienced man and qualified sufficiently to serve as a bosun when the regular bosun left the vessel.

So I respectfully submit that for each and all of those reasons your Honor should direct a verdict for the defendant on that particular claim, plus the additional fact that there has been failure, insufficiency, et cetera, of proof of proximate relationship between any alleged unseaworthiness by reason of personnel shortage and the claimed accident.

• • • • • • • •

(The following proceedings took place in the robing room:)

GRANTING OF MOTION FOR DIRECTED VERDICT

The Court: First on the motions made by defendant on which I reserved decision yesterday evening; on the defendant's motions I am granting the motion for a directed [fol. 56] verdict on the unseaworthiness claim with respect to shortage, the alleged shortage of personnel, on the

grounds set forth by defendant, and I am denying the remaining motions.

Mr. Kimball: If your Honor pleases, may I most respectfully, on behalf of the defendant, take exception in so far as your Honor has denied the defendant's motions for a directed verdict.

Mr. Friedman: Your Honor, I, of course, will take exception to the granting of a motion for a directed verdict.

May I also inquire of the Court whether in fact the Court is not dismissing the claim rather than directing the verdict?

The Court: Well, the motion was for a directed verdict. In effect, it is a dismissal of the claim in so far as it is based on unseaworthiness arising from the alleged shortage of personnel.

I have gone over the cases and I don't think on the facts here they are applicable. However, I am not actually dismissing any claim based on unseaworthiness arising out of the existence of wet paint or negligence or on any grounds including the giving of an order which might be considered negligence in the assignment of personnel who made up the complement for the aft docking operation.

* * * * * * *

[fol. 57]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NOTICE OF MOTION FOR NEW TRIAL

Sirs:

Please Take Notice that upon the annexed affidavit of Theodore H. Friedman, sworn to April 27, 1964, and upon all the pleadings and prior proceedings had herein, the undersigned will move this Court at the Chambers of Hon. Charles H. Tenney, U. S. D. J., Room 607, at the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 15th day of May, 1964 at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to

Rule 59, F. R. C. P. granting to the plaintiff a new trial, the grounds for such motion being:

1. The error and irregularity of declining to read to the jury the testimony on direct examination of the plaintiff with regard to what he did on the night of May 8, 1960 notwithstanding the jury's request therefor;

2. The failure to submit to the jury the plaintiff's claim of unseaworthiness based upon the alleged failure to provide sufficient manpower for the task of hauling and putting out the rope through the forward chock on the starboard aft part of the defendant's vessel's main deck on May 8, 1960 and the dismissal, as a matter of law, of plaintiff's claim related thereto; and

[fol. 58] 3. That the verdict for the defendant was against the weight of the evidence;

and upon such other grounds as the Court may deem just and proper in the premises.

Dated: New York, N. Y., April 27, 1964.

Yours, etc.,

Henry Isaacson, Attorney for Plaintiff, Office & P. O. Address 38 Park Row, New York 38, N. Y., Telephone No. CO 7-6557;

Phillips, Nizer, Benjamin, Krim & Ballon, Counsel for Plaintiff, Office & P. O. Address 1501 Broadway, New York 36, N. Y., Telephone No. WI 7-7600.

To:

Burlingham, Underwood, Barron, Wright, & White, Esqs., Attorneys for Defendant, 26 Broadway, New York 4, N. Y., Telephone No. HA 2-7585.

[fol. 59]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF THEODORE H. FRIEDMAN, READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Theodore H. Friedman, being duly sworn, deposes and says that:

1. I am associated with Phillips, Nizer, Benjamin, Krim & Ballon, counsel for the plaintiff, and acted as Trial Counsel in the above entitled action, and am fully familiar with the facts and prior proceedings had herein.

2. This affidavit is submitted in support of plaintiff's motion pursuant to Rule 59, F. R. C. P. for an order granting a new trial, this action having been tried for approximately 2½ weeks before a jury, which on April 16, 1964 returned a verdict for the defendant.

* * * * * * *

Ground 2. Dismissal of plaintiff's claim with regard to lack of sufficient manpower for particular task

28. It cannot be questioned that if a trial court is persuaded that it has committed an error of law in the conduct of the case, it is its duty to grant a new trial.

[fol. 60] 29. In the instant case, this Court took the relatively extraordinary step of dismissing as a matter of law plaintiff's claim as to unseaworthiness because of lack of sufficient assistance in performing his assigned task of hauling rope during the docking operation of May 8, 1960. While it is true that the Court did submit to the jury other aspects of plaintiff's suit, the fact remains that one claim was dismissed as a matter of law in an area where judicial

dismissals and deprivation of jury determination have been viewed with strong disfavor on repeated occasions by decisions of the Supreme Court. Plaintiff's dismissed claim could well have been his only claim, and the question of the correctness of its dismissal cannot be avoided by any reference to the decision to submit to the jury other theories of recovery.

30. This is particularly so because the most appealing claim that the plaintiff had was the one dismissed. The defendant had submitted extensive evidence that the paint on the deck was not still wet on May 8, 1960. It also submitted evidence indicating that all of the other men of the aft docking gang were fully occupied with other urgent tasks at the time the plaintiff and Chowaniec were assigned to hauling the rope and putting it out through the forward chock.

31. There was also evidence that the decision to use this chock may have come from a last minute decision of the pier master as the vessel was finally being placed in position, and that, accordingly, the Third Mate did not have any advance notice or opportunity to prepare for the use of that chock.

32. Thus the claim of negligence with regard to the number of men assigned to the task may have had scant appeal to the jury, even though they may have recognized that the number of men assigned to the job was less than sufficient.

[fol. 61] 33. It is precisely in these circumstances, where the exigencies of maritime hazards creates a risk of injury, that the law of unseaworthiness provides the necessary protection for the seaman.

34. Nor can the issue of lack of sufficient manpower for the particular task involved be turned into one of instantaneous operating negligence. The Third Mate gave his order directing two men to do the job. These two men then set about doing the job. It was the condition of two

men performing a job which three men should have done that constituted the asserted unseaworthiness. Whether that condition was created by a negligent order of an officer or whether, indeed, it had been created by the plaintiff's and Chowaniec's own decision, is of no relevance. If six hands and three backs were what was needed to haul that rope, and only four hands and two backs were doing it, and a man was injured thereby, the jury was entitled to find the vessel liable for unseaworthiness just as it would have been if the rope hauling a heavy load should have been 6 inches but was only 4 inches and broke because of the strain, and thereby injured one of the seamen.

35. Inasmuch as this point clearly involves issues of law, its further discussion will be left to the memorandum to be submitted herewith.

* * * * * * *

Wherefore, it is respectfully submitted that plaintiff's motion for a new trial may and should be granted in all respects.

Theodore H. Friedman.

(Sworn to April 27, 1964.)

[fol. 62]

IN THE UNITED STATES DISTRICT COURT

OPINION OF TENNEY, D.J.—November 9, 1964

Plaintiff moves herein for a new trial on the grounds of three alleged errors arising during the course of the trial.

As to points 1 and 3, the motion is denied.

Point 2 asserts that the Court erred in failing to submit to the jury plaintiff's claim of unseaworthiness based on the alleged failure to provide sufficient manpower for the task of hauling and putting rope through the forward chock on the starboard aft part of the defendant's vessel's main deck.

The following were the uncontroverted facts submitted to the Court and jury:

According to the Coast Guard certificate, the vessel was only required to carry on deck in the unlicensed department six able and three ordinary seamen; and in addition to the six able and three ordinary seamen she had a boatswain and two deck utility men. Her articles thus showed that she had three more unlicensed deck crewmen than her certificate required. At the time of the alleged accident, the vessel had on board every one of the deck crew shown on the articles.

The evidence further showed that, the vessel docking between 12 Noon and 4 P. M., there would in the ordinary course be one able seaman from the aft docking station at the wheel, acting as quartermaster; thus the full complement on the aft docking station during those hours would consist of five unlicensed members of the deck department under the command of the third officer, the five normally being three able and two ordinary seamen. At the time of the alleged accident and for a time prior thereto, there were five unlicensed men at the aft docking station, consisting of four able-bodied seamen and one ordinary sea-[fol. 63] man; thus the place of one ordinary seaman had been taken by an able-bodied seamen.

The alleged unseaworthiness consisted of the apportionment of the five men to do the various operations in that sector. Plaintiff claims that the condition which resulted from the third mate's apportioning of the men, i.e., two men assigned to do the work of three (plaintiff's expert testified that it was his opinion that the work ordered done was a three-four man job), regardless of whether the order was improvident or not, constituted unseaworthiness.

The Court, on the basis of the facts presented and the law, directed a verdict for the defendant on that claim. The Court's decision was based on a decision by Judge Patterson, in *The Magdapur*, 3 F. Supp. 971, 972-73 (S. D. N. Y. 1933), and certain language contained in *Pinto* v.

States Marine Corp., 296 F. 2d 1, 3 (2d Cir. 1961), cert. denied, 369 U. S. 843 (1962) and *Ezekiel* v. *Volusia S. S. Co.*, 297 F. 2d 215, 217 (2d Cir. 1961), cert. denied, 369 U. S. 843 (1962).

On reconsideration, I find these authorities both persuasive and controlling. Accordingly, plaintiff's contention as to point 2 is rejected, and plaintiff's motion is in all respects denied.

So ordered.

Dated: New York, New York, November 9, 1964.

Charles H. Tenney, *U. S. D. J.*

[fol. 64]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 93—September Term, 1965.

(Argued October 27, 1965)

Docket No. 29504

JAMES J. WALDRON, Plaintiff-Appellant,

—against—

MOORE-McCORMACK LINES, INC., Defendant-Appellee.

OPINION—January 31, 1966

Before: Lumbard, Chief Judge, Medina and Smith, Circuit Judges.

Appeal from a judgment and an order of the United States District Court for the Southern District of New York, Charles H. Tenney, Judge.

Plaintiff, a seaman, appeals from a judgment for defendant shipowner in a personal injury case in which, at the close of all the evidence, one of plaintiff's unseaworthiness claims was dismissed, and from an order denying plaintiff's motion for a new trial. Opinion below not reported. Affirmed.

[fol. 65] Theodore H. Friedman, New York, N. Y. (Henry Isaacson, and Phillips, Nizer, Benjamin, Krim & Ballon, New York, N. Y., on the brief), for plaintiff-appellant.

William M. Kimball, New York, N. Y. (Burlingham Underwood Barron Wright & White, New York, N. Y., on the brief), for defendant-appellee.

MEDINA, Circuit Judge:

James J. Waldron, an able seaman and a member of the crew of the SS Mormacwind, fell and injured his back as he and another member of the crew were hauling a heavy manila mooring line along the deck of the vessel during a docking operation. The issue of negligence and several features of the issue of unseaworthiness, as claimed by Waldron, were submitted to the jury who returned a verdict for defendant. One of the unseaworthiness claims against the shipowner having been dismissed and the motion for a new trial denied, the seaman appeals. The sole question before us on this appeal is whether the trial judge committed error when he refused to permit the jury to pass upon Waldron's additional claim of unseaworthiness based upon an order of the third mate that 2 men were to carry the line from where it was coiled on a grating on the deck to a mooring chock approximately 56 feet away. There was expert evidence to the effect that 3 or 4 men rather than 2 were required to carry the line in order to constitute "safe and prudent seamanship." It is not disputed that

the vessel was properly and fully manned and that the crew including the officer who gave the order were in all respects competent to perform their duties.

[fol. 66] The findings implicit in the verdict are: (1) that the order given by the third mate was not a negligent order, that is to say, plaintiff failed to convince the jury that under the circumstances a reasonably prudent man would not have given such an order; and (2) that the vessel was not unseaworthy because the deck was tacky from wet paint or was wet and slippery. No shore workers are involved nor is there any claim of a defect in the vessel or any of its gear, equipment and appliances.

I.

According to the log, the docking operation of SS Mormacwind at her Brooklyn pier was consummated in 11 minutes, between 1:20 and 1:31 P.M. on May 8, 1960. Coast Guard regulations required the vessel to carry on deck, in the unlicensed category, 6 able seamen and 3 ordinary seamen. In fact, she carried a boatswain and two deck utility men in addition. Thus the SS Mormacwind had three more unlicensed deck crewmen than her certificate required and all of them were on board during the docking operation.

Waldron was working in the aft docking gang on the starboard side of the ship, inboard, under the command of Tarantino, the third mate. The usual complement of this gang was 3 able seamen and 2 ordinary seamen. On this particular occasion, Tarantino had under his orders 4 able seamen, including Waldron, and 1 ordinary seaman.

As the operation progressed with the requisite dispatch, the officer on the bridge decided another mooring line was necessary as a spring line and the order was passed on to Tarantino. As all the other men were occupied with urgent tasks connected with the other lines, Tarantino assigned to Waldron and another able seaman, who was exceptionally strong and capable, the task of putting out this new line [fol. 67] "as quickly as possible." The other seaman took

the eye of the line, threw about 15 feet of slack "over one shoulder and over the other," and had reached the chock. Waldron was tugging at the top of the coil, attempting to flake some slack along the deck, when he slipped and fell.

Waldron's position on the particular phase of the claim of unseaworthiness that Judge Tenney refused to submit to the jury was very clear to the effect that "[i]t is a question of how many men were assigned to this particular job." It made no difference how well the vessel was manned. Nor was it of consequence that an adequate number of competent seamen were assigned to the group handling the lines aft under the direction of the third mate. "There could have been a hundred men on the stern, or five." Similarly, he contended that other factors, such as the urgency of getting out the new line, the tasks being performed by the other men, the condition of the current, wind and so on, were absolutely irrelevant to the issue of unseaworthiness, even though they did have a bearing on the issue of negligence.

We agree with Judge Tenney, whose short memorandum opinion is not reported, and we affirm.

II.

The doctrine of unseaworthiness has had a long history. The so-called warranty of seaworthiness in early American law has its roots in contracts of marine insurance and affreightment, under which liability was conditioned on the vessel being "sufficient in all respects for the voyage; well-manned, and furnished with sails and all necessary furniture." 1 Conkling, Admiralty Jurisdiction, 164-5 (1848). A similar requirement, stemming from the ancient codes, was implied in contracts for the carriage of goods and pas- [fol. 68] sengers by sea. Abbott, Merchant Ships and Seamen, 178-9 (1802); see *The Caledonia*, 1895, 157 U. S. 124. This duty to provide a seaworthy vessel was absolute, see *Work* v. *Leathers*, 1878, 97 U. S. 379-80; Abbott, Merchant Ships and Seamen, *supra*, at 178, 181; and, even in its early

foundations, seaworthiness was a threefold concept: the vessel must be "tight and staunch," her gear, equipment and appliances must be serviceable and in good order, and the crew, including the master and his subordinates, must be competent and sufficient in number to man the ship. 1 Parsons, Maritime Law 122 (1859); Desty, Manual of the Law Relating to Shipping and Admiralty, Section 232 (1879); *Lord* v. *Goodall S.S. Co.*, C. C. D. Cal., 1877, 15 Fed. Cas. 884, 887-88 (No. 8,506), aff'd on other grounds, 1880, 102 U. S. 541; *In re Meyer*, N. D. Cal., 1896, 74 Fed. 881, 885; *The Gentleman*, S. D. N. Y., 1845, 10 Fed. Cas. 190, 192 (No. 5,324), rev'd on other grounds, C. C. S. D. N. Y., 10 Fed. Cas. 188 (No. 5,323); *Tait* v. *Levi*, [K. B. 1811] 14 East 481.

For a variety of reasons, historical, ethical, sociological and others, we should not be surprised to find that the interests of cargo owners and passengers were paramount in the early days just referred to. Humanitarian considerations were not in vogue. Although the unseaworthiness of a vessel gave a seaman the right to abandon ship without penalty and to be paid his wages, see *Dixon* v. *The Cyrus*, D. Pa., 1789, 7 Fed. Cas. 755 (No. 3,930); *Rice* v. *The Polly and Kitty*, D. Pa., 1789, 20 Fed. Cas. 666 (No. 11,754), and mariners were entitled to maintenance and cure for injuries suffered in the service of the ship, see *Harden* v. *Gordon*, C. C. D. Me., 1823, 11 Fed. Cas. 480 (No. 6,047), the early maritime law afforded no remedy by way of compensatory [fol. 69] damages for personal injuries. See Lucas, Flood Tide: Some Irrelevant History of the Admiralty, 1964 Supreme Court Review 249, 299; Smith, Liability in the Admiralty for Injuries to Seamen, 19 Harv. L. Rev. 418, 431 (1906).

From 1903 and the much discussed dictum of *The Osceola*, 189 U. S. 158, through the Jones Act in 1920, 41 Stat. 1007, 46 U. S. C., Section 688, the long series of longshoreman cases down to *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U. S. 539, and beyond, there has developed a vast body of

federal law concerning the right of a seaman, or a person performing the traditional duties of a seaman, to recover compensatory damages for injuries caused by the unseaworthiness of the vessel. It no longer matters in these personal injury cases whether the unseaworthy condition was caused by the negligence of the shipowner or anyone else. The rule that the so-called warranty applies only to the vessel as she left her home port at the commencement of the voyage, which posed the problem we found so vexing in *Dixon* v. *United States*, 2 Cir., 1955, 219 F. 2d 10, has, at least in some respects, been blown away by the winds of time. But the basic threefold concept of a sound ship, proper gear and a competent crew has remained unchanged. Each of these contributes in a special way to provide "a vessel reasonably suitable for her intended service." *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U. S. 539, 550, *supra*. It may therefore be profitable briefly to examine the developments in the maritime law applicable to each of these three separate but complementary phases of the warranty of seaworthiness.

Little need be said concerning the requirement of a ship "tight and staunch," as the 1936 Carriage of Goods by Sea Act, 46 U. S. C., Sections 1300 ff., has cut down the shipowner's duty to the exercise of due care only with respect [fol. 70] to cargo owners. We have found nothing to indicate that the duty to furnish a sound ship is less than absolute vis-à-vis members of the crew. Pertinent illustrations are cracked plates, *McGee* v. *United States*, 2 Cir., 1947, 165 F. 2d 287, the falling of a rotted signal mast, *Nagle* v. *United States*, S. D. N. Y., 1953 A. M. C. 2109, blobs of grease or spots of oil on the deck or on ladders, *Yanow* v. *Weyerhaeuser S.S. Co.*, 9 Cir., 1957, 250 F. 2d 74, cert. denied, 1958, 356 U. S. 937; *Calderola* v. *Cunard S.S. Co.*, 2 Cir., 1960, 279 F. 2d 475, cert. denied, 364 U. S. 884. Often, and probably generally, the question is one of fact for the judge or jury as in *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U. S. 539, *supra*, where there was fish gurry on the ship's rail.

See also *Blier* v. *United States Lines Co.*, 2 Cir., 1961, 286 F. 2d 920, cert. denied, 368 U. S. 836. But there must always be proof on the basis of which a finding of unseaworthiness can be made.

It is with respect to the ship's gear, equipment and appliances that the most significant developments along liberal lines have taken place. It now makes no difference that other safe gear was available but not used. See, e.g., *Mahnich* v. *Southern S.S. Co.*, 1944, 321 U. S. 96. Shore workers, including longshoremen and others performing tasks traditionally the work of seamen, became entitled to the benefits of the warranty of seaworthiness. *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85. And the doctrine has been applied to them even if the defective gear was supplied by the stevedore who brought it aboard ship. See, e.g., *Alaska S.S. Co.* v. *Petterson*, 1954, 347 U. S. 396, affirming 205 F. 2d 478 (9 Cir., 1953). Even if the gear or appliances were not defective, a maladjustment might make them dangerous and the vessel could be found unseaworthy. [fol. 71] *Crumady* v. *The Joachim Hendrick Fisser*, 1959, 358 U. S. 423. So also with a stuck valve that could only be "broken" by the use of tools or several men working together. *American President Lines, Ltd.* v. *Redfern*, 9 Cir., 1965, 345 F. 2d 629. So also with a portable aluminum ladder leading to the hold which slipped out of place and fell due to the movement of the ship, despite the fact that an officer had placed a man to hold it and had told him to keep watch over it. *Reid* v. *Quebec Paper Sales & Transp. Co.*, 2 Cir., 1965, 340 F. 2d 34. Other instances of dangerous conditions caused by defects in, or analogous improper use of, various types of gear and equipment could be multiplied.[1]

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[1] *Grillea* v. *United States*, 2 Cir., 1956, 232 F. 2d 919, 922, refers to the question "whether a *defect in hull or gear* that arises as a momentary step or phase in the progress of work on board should be considered as an incident in a continuous course of operation" (emphasis supplied). See also *Ferrante* v. *Swedish American Lines*, 3 Cir., 1964, 331 F. 2d 571, petition for cert. dismissed, 379 U. S.

Many of the cases above referred to, and others, have been cited in appellant's brief. We are urged to take the position in this case that the principles of these gear and equipment cases are applicable here on the theory that any condition aboard ship that is of potential danger to the members of the crew is necessarily a condition of unseaworthiness, irrespective of how it came into existence and, of course, irrespective of any negligence or fault on the part of the shipowner or his agents or the officers or other members of the crew.

The reason we cannot do this is inherent in the traditional triple concept of unseaworthiness. With respect to the crew, including the officers, all that is or has been re- [fol. 72] quired is that the vessel be properly manned. That is to say, in order to be "reasonably suitable for her intended service" the vessel must be manned by an adequate and proper number of men who know their business. There is no requirement that no one shall ever make a mistake. If someone is injured solely by reason of an act or omission on the part of any member of a crew found to be possessed of the competence of men of his calling, there can be no recovery unless the act or omission is proved to be negligent. We have found no authority to the contrary. Indeed, this rule seems to us to be based not only on a uniform course of judicial opinion but also on sound reason. In the management of the vessel both at sea and in port, moments of lesser or greater urgency are bound to occur when quick decisions have to be made, and there is always the possibility of what may appear by way of hindsight to be errors of judgment. To alter the rule, in the absence of legislation, would, we think, come close to requiring the shipowner to provide "an accident proof" ship, which the

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801; *Thompson* v. *Calmar S.S. Corp.*, 3 Cir., 1964, 331 F. 2d 657, cert. denied, 379 U. S. 913.

In *DeLima* v. *Trinidad Corporation*, 2 Cir., 1962, 302 F. 2d 585, there was not only a quantity of oil on the deck of the engine room but the vessel was not properly manned, as 2 of the 3 wipers had left the ship earlier in the voyage and had not been replaced.

teaching of Mr. Justice Stewart's landmark and highly clarifying opinion in *Mitchell Trawler Racer, Inc.*, 1960, 362 U. S. 539, 550, *supra*, specifically negates.

III.

In any event, the uniform current of authority in this Circuit supports the view and we hold that, if the shipowner has furnished a well-manned ship, with a competent crew, there can be no liability for personal injuries caused by an order of an officer of the ship that is not proved to be such as would not have been made by a reasonably prudent man under the circumstances.

In *The Magdapur*, S. D. N. Y., 1933, 3 F. Supp. 971, Judge Patterson decided the precise question here involved and [fol. 73] held that the vessel was not shown to be unseaworthy. The only difference is that 3 men were ordered to move a heavy mooring wire and there was evidence that 6 or 7 men were necessary. The ground of decision was that the warranty of seaworthiness required only an adequate number of competent men in the crew and it was not shown that any of the men on hand and available lacked the skill and ability of men of their calling. "The error was that of the chief officer in assigning to the particular task too few of the men available for work." 3 F. Supp. at 972.

Judge Patterson's ruling in *The Magdapur* was cited with approval by Judge Learned Hand in 1952 in *Keen* v. *Overseas Tankship Corp.*, 2 Cir., 194 F. 2d 515, cert. denied, 343 U. S. 966, in the course of his discussion of the point that, if a member of the crew was incompetent, it was not necessary to prove that the shipowner knew or had reason to believe he was incompetent.

Two later cases in this Circuit also follow the principle that there must be proof of incompetence on the part of an officer of the vessel to warrant a finding of unseaworthiness based upon "allegedly imprudent action by a seaman's superior." *Ezekiel* v. *Volusia S.S. Co.*, 2 Cir., 1961, 297 F. 2d 215, 217, cert. denied, 1962, 369 U. S. 843; *Pinto* v.

States Marine Corp., 2 Cir., 1961, 296 F. 2d 1, cert. denied, 1962, 369 U. S. 843. We adhere to these rulings.

Affirmed.

SMITH, Circuit Judge (dissenting):

I dissent.

The central proposition of the Court's opinion is the rule stated in *Pinto* v. *States Marine Corp. of Delaware*, 296 F. 2d 1 (2 Cir. 1961), cert. den. 369 U. S. 843 and in *Ezekiel* v. *Volusia S.S. Co.*, 297 F. 2d 215 (2 Cir. 1961), cert. den. [fol. 74] 369 U. S. 843, that the doctrine of unseaworthiness does not extend to an injury caused by "an order improvidently given by a concededly competent officer on a ship admitted to be in all respects seaworthy," Gilmore & Black, The Law of Admiralty (1957), 320. Gilmore and Black call such a case "an almost theoretical construct." For two reasons I do not believe this proposition even if it still has vitality should control this case.

First, the proposition evidently refers to cases where there is alleged to be a negligent creation of unseaworthiness. Gilmore & Black cited *Chelentis* v. *Luckenbach S.S. Co.*, 247 U. S. 372 (1918), *McMahon* v. *The Panamolga*, 127 F. Supp. 659 (D. Md. 1955), and *Imperial Oil, Ltd.* v. *Drlik*, 234 F. 2d 4 (6 Cir. 1956), all dealing either with negligence or the negligent creation of unseaworthiness. In this case, however, appellant's claim for unseaworthiness which was dismissed did not depend on negligence; it survives the verdict making it implicit that there was no negligent order given.

Second, appellant does not admit that the ship was "in all respects seaworthy." His case is that the ship was unseaworthy because of the manner in which the rope was used. Whether an appliance or item of gear is serviceable and in good order cannot be determined abstractly. It depends on whether the gear is reasonably fit for its intended use. Inquiry into this involves determining both the purpose for which the gear is used, and the manner in which it is used. This is precisely what occurred in *American*

President Lines, Ltd. v. *Redfern*, 345 F. 2d 629 (9 Cir. 1965), *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 (3 Cir. 1964), and *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959). In each of these cases there was unseaworthiness because gear was employed in a manner which [fol. 75] turned out to be improper. In *Ferrante* it was "undisputed that the ship's equipment—the manilla ropes —was fit for its intended use." Yet it was used in an abnormal manner, and injury resulted. And in *Redfern*, the court said, "a stuck sea valve . . . is suitable only if operated by two men; otherwise it constitutes a dangerous condition," and held that the vessel was unseaworthy. In *Crumady* unseaworthiness resulted when a circuit breaker safety device in a winch was set for a stress greater than the same working load on the unloading gear.

I see no meaningful difference between rendering safe equipment defective and unsafe, which is *Crumady*, see also *International Nav. Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218 (1901), and using equipment in a manner which makes it unsafe, which is *Ferrante*, *Redfern*, and this case.

The fact that the unsafe method arose out of an order does not excuse the ship. An order usually lurks in the background of the act of a seaman in the performance of his duties.

Nor is the fact that the crew was as a whole complete a bar to recovery. In the first place appellant alleges that it was the method of employing gear which made the vessel unseaworthy, not crew size or competence. Secondly, the argument that the crew as a whole was adequate is merely stating in another form the defense rejected in *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96 (1944), that the vessel had available safe equipment which was not used. The unseaworthiness issue in *The Magdapur*, 3 F. Supp. 971 (S. D. N. Y. 1933), was decided solely on the theory that the vessel as a whole was adequately manned. This rationale cannot stand in the face of the development of the doctrine in the intervening years, illustrated by the holding in *Mahnich*.

I would reverse for new trial on the unseaworthiness issue.

[fol. 76]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES J. WALDRON, Plaintiff-Appellant,

v.

MOORE-McCORMACK LINES, INC., Defendant-Appellee.

JUDGMENT—January 31, 1966

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are affirmed.

A. Daniel Fusaro, Clerk.

[fol. 82]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

Before Lumbard, Chief Judge, Medina and Smith, Circuit Judges.

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING EN BANC—February 7, 1966

Motion granted.

JEL, HRM, U.S.C.JJ.

February 7, 1966

[fol. 86] Plaintiff-Appellant's Petition for Rehearing and Rehearing in Banc (omitted in printing).

[fol. 105]

United States Court of Appeals

For the Second Circuit

[Title omitted]

Order Denying Petition for Rehearing—March 17, 1966

Petition for rehearing denied.

J. E. L., H. R. M., U.S.C.JJ.

I dissent.

J. J. S., U.S.C.J.

Mar. 17, 1966

[fol. 109]

United States Court of Appeals

For the Second Circuit

[Title omitted]

Order Denying Petition for Rehearing In Banc—March 17, 1966

As no active circuit judge has requested that this case be reheard in banc, and as Judge Medina, who is qualified to vote thereon by virtue of 28 U.S.C. § 43 votes to deny, the petition is denied.

J. Edward Lumbard, Chief Judge.

March 17, 1966

[fol. 113] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 114]

SUPREME COURT OF THE UNITED STATES

No. 233—October Term, 1966

JAMES J. WALDRON, Petitioner,

v.

MOORE-McCORMACK LINES, INC.

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.